

Entered on Docket
May 25, 2016
EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



1
2 **The following constitutes**
3 **the order of the court. Signed May 24, 2016**
4
5
6

A handwritten signature in black ink, appearing to read "Charles Novack".

7
8
9 **Charles Novack**
10 U.S. Bankruptcy Judge
11
12
13
14

15 UNITED STATES BANKRUPTCY COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17
18
19
20
21

22 In re:
23 ADAM GIFFORD, III,
24 Debtor.
25

26 Case No. 15-43651 CN
27 Chapter 7
28

29 **TENTATIVE MEMORANDUM
30 DECISION ON MOTION TO AVOID
31 JUDICIAL LIENS**

32 On May 12, 2016, this court conducted a hearing on Chapter 7 debtor's motion to avoid the
33 judicial liens of American Express Bank ("AMEX"), Roberta Gordon, Trustee of the Roth Living
34 Trust ("Gordon"), and Union Bank (the successor of which is The Best Service Co, Inc. ("Best Co."))
35 under Bankruptcy Code § 522(f)(1). While the debtor served his motion to avoid liens on all of the
36 above parties, only Best Co. filed a response. For the reasons stated below, the court avoids the
37 judicial lien of American Express, determines that Gordon no longer holds a judicial lien, and
38 partially grants the motion as to Best Co.

39 Adam Gifford ("Gifford") filed a Chapter 7 bankruptcy on November 30, 2015. When he
40 filed this case, he owned a one-half tenancy in common interest in a residence located at 979
41 Overlook Road in Berkeley, California. Gifford and his co-owner took title to the property in 2001.
42 Gifford resides at the Overlook Road property with his minor child, and claims a \$100,000
43 homestead exemption in the Overlook Road property. No one has objected to this exemption.
44 Gifford valued the entire Overlook Road property at \$880,000 (as of his petition date), and listed the
45 following liens/encumbrances against it:

1. A Bank of America deed of trust securing a note balance of \$343,915;
2. A Mission Area Federal Credit Union deed of trust securing a note balance of
3. \$27,200;
4. Best Co.'s abstract of judgment, with a balance due of \$111,254.00 (recorded on
5. August 27, 2010).¹
6. AMEX's abstract of judgment, with a balance due of \$39,280 (recorded on September
7. 24, 2010);
8. IRS tax liens totaling \$75,966 (recorded on February 7, 2011 and March 20, 2012);
9. and
10. 6. A notice of a pre-judgment writ of attachment filed by Gordon for \$137,845 (recorded
11. on July 20, 2010).

12. The two deeds of trust are secured by the entire Overlook Road property. Best Co. and
13. AMEX's abstracts of judgment, the IRS tax lien, and Gordon's writ of attachment only attached to
14. Gifford's tenancy in common interest, and they attached to his interest several years after he took
15. title.

16. Gordon's writ of attachment arose from San Francisco County Superior Court litigation
17. entitled "Roberta Gordon, as Trustee of the Roth Living Trust v. Adam Gifford, James Albera, All
18. Auto Collision Repair, Inc." Case No. 2010070023/CGC-09-492690 (the "Gordon Litigation").
19. Gordon commenced the Gordon Litigation on September 18, 2009, and the San Francisco County
20. Superior Court granted Gordon's application for a writ of attachment against Gifford on July 9,
21. 2010. A notice of attachment was recorded in the Alameda County Recorder's Office on July 20,
22. 2010, which created a lien against the Overlook Road property. See Cal. Prac. Guide: Enforcing
23. Judgments and Debts (TRG), ¶ 4.2.1. Gordon dismissed her complaint against Gifford (and all other
24. parties) on February 10, 2012.² As a result, Gordon's lien against the Overlook Property terminated

26. ¹ Best Co. recorded a second abstract of judgment on July 7, 2015.

27. ² The court takes judicial notice of the San Francisco County Superior Court docket in the
28. Gordon Litigation.

1 as a matter of law under California Code of Civil Procedure § 488.510(a).

2 Gifford asserts that the Best Co and Amex liens and the Gordon notice of attachment impair
3 his homestead exemption, and that this court should avoid these liens and notice of attachment. Best
4 Co. argues that there is sufficient equity in the Overlook Road property to fully secure its lien. Both
5 positions are incorrect.

6 Bankruptcy Code § 522(f)(1) authorizes Gifford to avoid judicial liens which impair his
7 homestead exemption. Section 522(f) provides in pertinent part that:

8 “(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the
9 debtor may avoid the fixing of a lien on an interest of the debtor in property to the
extent that such lien impairs an exemption to which the debtor would have been
entitled under subsection (b) of this section, if such lien is—

10 (A) a judicial lien

11 (2)(A) For the purposes of this subsection, a lien shall be considered to impair an
12 exemption to the extent that the sum of –

13 (I) the lien;

14 (ii) the other liens on the property;

15 (iii) the amount of the exemption that the debtor could claim if there were no
16 liens on the property;
17 exceeds the value that the debtor's interest in the property would have in the absence of any liens.

18 (B) In the case of a property subject to more than 1 lien, a lien that has been avoided
19 shall not be considered in making the calculation under subparagraph (A) with respect
20 to other liens.”

21 The court applies this formula as follows: Gifford jointly owns the Overlook Road property,
22 and there are two consensual deeds of trust against the entire property. Under *In re Meyer*, 373 B.R.
23 84 (B.A.P. 9th Cir. 2007), the court first deducts the amounts secured by the deeds of trust from the
24 value of the entire property, and then determines the debtor's interest in the remaining value (in this
25 case, a one-half interest). This arithmetic leaves \$254,443 in value for Gifford. The court then
26 applies § 522(f)(2) to each lien, starting with the most recently filed judicial lien. See *In re Meyer*,
27 373 B.R. at 87- 88.

28 Under § 522(f)(2), the AMEX judicial lien is fully avoided under the following calculation:
\$39,280.00 + \$75,966 (IRS) + \$111,254 (Best Co.) + \$100,000 (homestead exemption) = \$326,500,
which exceeds Gifford's \$254,443.00 interest by \$72,057, which is more than the amount of the

1 AMEX lien.

2 Under § 522(f)(2), the Best Co. judicial lien is only partially avoided: \$111,254 + \$75,966 +
3 \$100,000 = \$287,220, which exceeds Gifford's interest by \$32,777, leaving \$78,477 of Best Co.'s
4 lien attached to the Gifford's co-tenancy interest in the Overlook Road property.³

5 Gordon's notice of attachment was not a judicial lien as of the petition date and therefore is
6 not part of the § 522(f)(2) calculation. Bankruptcy Code § 101(37) defines a "lien" as a "charge
7 against or interest in property to secure payment of a debt or performance of an obligation." Under
8 California law, whatever charge or interest Gordon had in the Overlook Road property expired no
9 later than July 9, 2013 - three years after the writ of attachment was issued (and may have expired
10 earlier when she dismissed the Gordon Litigation against Gifford). *See* California Code of Civil
11 Procedure 488.510(a): "Unless sooner released or discharged, any attachment shall cease to be of any
12 force or effect, and the property levied upon shall be released from the operation of the attachment, at
13 the expiration of three years from the date of issuance of the writ of attachment under which the levy
14 was made." *See also Arcturus Mfg. Corp. v. Superior Court* (1963) 223 Cal.App.2d 187. When
15 Gifford filed his Chapter 7 bankruptcy in November 2015, this encumbrance had long since expired,
16 and no longer qualified as a judicial lien against Gifford's interest in the Overlook Road property.

17 This memorandum decision alters the analysis that the court provided during the May 12,
18 2016 hearing. If either party wishes to contest this decision, they should file an appropriate pleading
19 by June 3, 2016. The court will schedule a further hearing if such a pleading is timely filed. If
20 neither party files a further pleading, this memorandum decision is final, and Gifford's counsel
21 should submit an order consistent with this memorandum.

22
23
24 * * *END OF ORDER * * *
25
26

27
28 ³ No one disputes that the AMEX and Best Co. liens are judicial liens under Bankruptcy
Code § 101(36).

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

1 Case No. 15-43651 CN

2 **COURT SERVICE LIST**

3 Adam Gifford, III
4 979 Overlook Road
Berkeley, CA 94708

5 Kevin Kump
6 Law Offices of Clark Garen
6700 s. Centinela Avenue, Third Floor
Culver city, CA 90230

7
8 Other recipients are ECF participant

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28